U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: September 8, 1998
Case No. 98 INA 101

In the Matter of:

ARMENIAN SISTERS ACADEMY,
Employer,

on behalf of

NOSHIR MEHTA,
Alien.

Appearance: C. P. Tanna, Esq., of San Diego, California, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ma NOSHIR MEHTA ("Alien") by ARMENIAN SISTERS ACADEMY ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

STATEMENT OF THE CASE

On February 15, 1994, the Employer applied for alien labor certification for the permanent full time employment of the Alien as a "Teacher" with the following duties:

> Teaches elementary school pupils academic, social and manipulative skills. Prepare teaching outline for course of study in English, Social Studies and Science for the 5th and 6th grade studies. Lectures, demonstrates and uses audio-visual teaching aids to present subject matter to class. Prepares, administers & corrects test and records results. Counsels pupils when adjustment and academic problem arises. Discuss pupils academic and behavior problems with parents and suggest remedial action.

AF 51, box13. The position was classified as a "Teacher (Elementary)" under DOT Occupational Code No. 092.227-010.[2] The required Education was six years of college with the Major Field of Study in English or Social Science. The Other Special Requirements were the following:

> Good communication skills, course work in English, Social studies and Science. Ability to deal with younger children.

Id., box 15. The position was forty hours per week from 8:00 AM to 3:15 PM, with no overtime. The rate of pay offered was $1,700 per month. *Id*., box 12. After the job was advertised, five U. S. workers applied for the job, but none of them was hired. AF 50.

Notice of Findings. On February 5, 1996, the CO's Notice of Findings ("NOF") denied the application, subject to the Employer's rebuttal. (1) The CO found that the Employer was in violation of 20 CFR §§ 656.20(c)(2) and 656.40(a)(2)(i) because its salary offer of $1,700, was more than five percent below the prevailing wage of $2,274. Moreover, if Employer's assertion that it cannot afford to pay the prevailing wage is factual, added the CO, the job is not "clearly open to any qualified U. S. worker," and the Employer was in violation of subsection h of the conditions of employment certified by the Employer in box 23 of the application, Form ETA 750A. AF 52. Employer was directed to prove in its rebuttal that the salary it offered was not more than five per cent less than the prevailing wage rate found for the area of intended

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

employment. (2) Citing 20 CFR § 656.21(b), the CO said the Employer's requirement of a master's degree was restrictive. As the Specific Vocational Preparation ("SVP") for a Teacher, Elementary, is seven under the DOT job description, it is satisfied with from two to four years of schooling after high school. On the other hand, Employer's requirement of a master's degree exceeds the SVP and is a restrictive hiring criterion because it requires six years of school. The Employer was told either to delete or amend this restrictive requirement, or to prove that it is a business necessity. (3) Finally, the CO noted that the Employer improperly rejected U. S. workers who appeared qualified for the position and were referred by the state employent service. Citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii), the CO said applicant Trehan was rejected for reasons based on the restrictive requirement discussed above, which were neither lawful nor work-related. In addition, said the CO, the Employer rejected U. S. workers Dauscher and Sifter, who were qualified by education, training and/or experience, or a combination of such factors. 20 CFR §656.24(b)(2)(ii).[3] The CO directed the Employer to file rebuttal evidence to prove that it had rejected each of these U. S. workers for reasons that were lawful and job-related. AF 47-48.

Rebuttal. The Employer's March 6, 1996, rebuttal addressed the issues noted in the NOF. AF 36-44. The rebuttal consisted of statements by the Principal of the Employer, who argued that the wage offered was consistent with the prevailing wage. Employer then offered to eliminate the hiring criterion that the CO found unduly restrictive, but contended that the rejection of U. S. workers was not based on the hiring criterion that the CO had found unduly restrictive.[4]

Final Determination. On February 10, 1997, the NOF was summarized in the Final Determination issued by the CO, who concluded that Employer's rebuttal failed to correct the prevailing wage defect it discussed. The CO explained that in its rebuttal the Employer continued to insist that it was governed by a wage that had been approved for use in a visa application in 1992, even though the approval of that wage rate occurred three years before the date of application and some five years before the rebuttal was filed. Employer also appeared to have ignored the circumstance that the teaching job for which the 1992 prevailing wage was approved required a baccalaureate degree and not a master's degree, and required skills substantially inferior to the job described in this application. The CO concluded by denying certification on grounds that the Employer failed to offer the prevailing wage for this position, in violation of the Act and regulations.

Appeal. On March 12, 1997, the Employer filed a motion to reconsider and an appeal. With that motion the Employer offered arguments by counsel and new evidence to add to its rebuttal. The CO denied the motion for reconsideration on March 21, 1997, and referred this

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[3] 20 CFR §656.24(b)(2)(ii) provides that the Certifying Officer shall "consider a U. S. worker able and qualified for the job opportunity, if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as [it] customarily [is] performed by other U. S. workers similarly employed."

[4] The amendment to the hiring criteria caused the file to be remanded and reconsidered before the CO reached a Final Determination.

matter for review by the Board of Alien Labor Certification ("the Board"). As "Exhibit A" the Employer's appellate brief proffered new evidence to prove that the CO's prevailing wage finding was incorrect. 20 CFR § 656.26(b)(4), however, requires that, "The request for review, statements, briefs, and other submissions of the parties and *amicus curiae* shall contain only legal argument and only such evidence that was within the record upon which the denial of labor certification was based." 20 CFR § 656.27(c) further provides that rebuttal evidence submitted after the Final Determination was issued is not part of the record and cannot be considered on appeal. **Memorial Granite**, 94 INA 007 (Nov. 30, 1994).[5] Because the Employer clearly had an opportunity to present Exhibit A under procedural regulations of the Department of Labor, its proffer more than a year after the Employer received the Final Determination was untimely. **Andrea Foods**, 94 INA 309 (Sep. 21, 1994). The Employer's allegations without supporting evidence that the survey data in Exhibit A was newly acquired and that its failure to submit the proffered items was "harmless error" are not persuasive reasons for its failure to submit Exhibit A before the CO issued the Final Determination. To the contrary, this document was published in July of 1996, between the date Employer filed the rebuttal on March 6, 1996, and February 10, 1997, the date the Final Determination was issued. On its face this document clearly indicates that it was available from the U. S. Government Printing Office for several months before the CO decided this case. The Employer nevertheless failed to provide Exhibit A until it filed its appellate brief, and it offered no citation of law or governing precedent to support its claim that this failure to comply with the procedural regulations was a "harmless error."

For these reasons we conclude that the CO's finding that Exhibit A, which Employer offered with its motion for reconsideration, cannot be considered on reconsideration was supported by the evidence of record. **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*).[6] We also find that because Exhibit A, which was attached to the Employer's appellate brief, clearly exceeded the scope of permitted appellate submissions under 20 CFR §§ 656.26(b)(4) and 656.27(c), it cannot be considered by the Panel on review of the Final Determination for these reasons. **Databyte Technology, Inc.**, 93 INA 263 (Jun. 28, 1994).[7]

Discussion

Prevailing Wage. Our decision turns on the meaning of the term "prevailing wage" to the facts of record in this case. The Employer, a private elementary school located in Los Angeles County, contends the prevailing wage it must pay to an alien it wishes to hire as a Social Studies Teacher cannot properly be determined by considering the wages paid to such workers by both public and private schools in the area of intended employment. The Employer contests the CO's

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[5] As the Employer offered no explanation for its failure to present new data and exhibits at the time of rebuttal no alternative disposition of the proffered new evidence is appropriate. **Mount Sinai Medical Center**, 94 INA 109 (Jun. 27, 1995); **Re/Max Realty Group**, 95 INA 015 (Jul. 19, 1996).

[6] Also see as to newly obtained evidence **Reliable Mortgage Consultants**, 92 INA 321 (Aug. 4, 1993)

[7] Also see **Cappriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

application of the facts of record to 20 CFR § 656.20(c) (2), which provides that,

> Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that: ... (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work ... .

20 CFR § 656.40(a)(2)(i) defined the prevailing wage for positions not covered under the Davis-Bacon Act, 40 U.S.C. §§ 376a, *et seq.*, as, "[t]he average rate of wages, that is, the rate of wages to be determined to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. ..." 20 CFR § 656.40(b) further provides that, "[S]imilarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," ... .

Burden of Proof. § 212(a)(14) of the Immigration and Nationality Act of 1952, as amended by § 212(a)(5)(A) of the Immigration and Nationality Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A), was enacted to exclude aliens competing for jobs U. S. workers c would fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979). To achieve this Congressional purpose the Department of Labor adopted regulations setting forth provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible.[8]

Employer's argument. Employer argued that $2,274 a month is not the "correct and appropriate" amount of the prevailing wage under the facts of this case, and that the CO erroneously failed to explain how this amount was derived and to provide the Survey to the Employer. There is no question that an employer contesting the amount of such a wage determination is entitled to that information, since it bears the burden of establishing both that the CO's wage determination is in error, and that the employer's own wage offer equals or exceeds the correct prevailing wage. **William Flint Painting & Cleaning Company**, 90 INA 256 (Dec. 9, 1992). Employer's obligation, however, is based on the premise that, upon its request, the employer was made aware of the source for and basis of the CO's determination. **John Lehne & Son**, 89 INA 267 (May 1, 1992)(*en banc*).

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[8] In addition the Department of Labor incorporated into 20 CFR § 656.2(b) the text of § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, which provided that, "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act. ..." 20 CFR § 656.2(b) is consistent with the legislative history of the 1965 Amendments to the Act which establishes that Congress intended to place the burden of proof for obtaining labor certification on an employer that seeks an aliens's entry for permanent employment. See S. Rep. No 748, 89th Cong., 1st Sess., reprinted in 1965 U. S. Code Cong. & Ad. News 3333-3334.

The Employer said the CO failed to provide the information on which the Final Determination finding of the applicable prevailing wage was based.[9] AF 14. That condition was satisfied as to this Employer, however. The Employer was not confronted with the task of rebutting a wage rate "of ambiguous origin, or one which is not easily accessible," as was the case in **John Lehne & Son**. On the contrary, this Employer was informed early in the proceeding by the state employment security service letter of July 16, 1994, that the prevailing wage of $2,274 a month for similar workers located in the same labor market was based on its Alien Certification Wage Survey. AF 113-114. At that time Employer declined to amend its original wage offer of $1,700 per month, relying on the findings of the survey it requested of the state employment security service on July 10, 1992, which was completed and sent to the Employer on July 15, 1992, for it to use in a visa application for the Alien under H1-B. AF 112, 115, 116. In its rebuttal to the NOF the Employer again rejected this 1994 Survey data, on which the CO found the prevailing wage that was designated as an issue in the NOF. As the Employer could have obtained the Alien Certification Wage Survey on its own, or asked the state employment security service or the CO for a copy, the wage rate found by the CO was not of "ambiguous origin," and its source was "easily accessible." Consequently, the Employer's argument that the CO failed to provide the information on which the determination of the applicable prevailing wage was based is contrary to the evidence of record and is without merit.

This is not the Employer's real point of dispute, however. It has at all time contended that in determining the prevailing wage the CO should recognize as a separate class the elementary school teachers who work for private schools like that of the Employer, as distinguished from the elementary school teachers who work for the public schools.[10] Given the plain meaning of the text in 20 CFR § 656.40(b), as quoted above, the Employer is urging the Board to establish an exception to the traditional application of "similarly employed" under these regulations. As a general rule, exceptions should be inaugurated only with reluctance, as they erode clarity in interpretation. The subclass that the Employer seeks to inaugurate in this case is unacceptable for this reason, as well.

As the Board pointed out *en banc* in **Hathaway Children's Services**, 91 INA 388 (Feb. 4, 1994), this Employer is competing in the same pool of elementary school teachers as all other elementary schools, including both the private and the public schools. No rule based on any aspect of an employer's business, whether privately or publicly owned, can be reconciled with the regulations as written. The Employer is competing in the same pool of elementary school teachers as are all other elementary schools, both private and public. The hiring of the Alien as an elementary school teacher at a rate of pay below the prevailing wage will depress the wage level

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[9] Employer cited **Linen Star**, 90 INA 438 (Dec. 7, 1990) (*en banc*).

[10] In this case we recognize that certification is an exception to the Act's broad limits on immigration into the United States. Thus, the Act's provision for alien labor certification is subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

of U. S. workers who are looking for such a job, as they are in the same market.

Summary. The underlying purpose of determining a prevailing wage rate is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality. It follows that the plain meaning of the term "similarly employed" does not refer to the nature or ownership or the Employers business as such. Rather, it must be determined on the basis of the similarity of the skills and knowledge required for the performance of the job offered. This principle finds its parallel in other regulations relating to the administration of the regulatory provisions regarding the hiring process, the level of skills, and the rate of pay. Uniformly, they require the CO to consider only the worker's capacity to perform the job and ignore the nature and structure of the employer's business.[11] While it is possible that the nature and structure of an employer's business could be reflected in the CO's determination to the extent that it bears on the knowledge and skills required to perform the job duties, there is nothing in this Appellate File that suggests that the job duties of the position offered differ as between a private and a public elementary school. We find no basis under the Act and regulations for allowing the Employer to hire the Alien at a rate of pay that is less than the prevailing wage that is paid to the teachers in the other elementary schools in Los Angeles County.[12]

Accordingly, the following order will enter.

ORDER

We hereby affirm the Certifying Officer's denial of alien labor certification.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is

[11]The most explicit example is 20 CFR § 656.24(b)(2)(ii), which provides in relation to job qualifications that, "The Certifying Officer shall consider a U. S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U. S. workers similarly employed ...."

[12] For somewhat stronger language see **Norberto La Rosa**, 89 INA 287 (Mar. 27, 1991), as cited in **Hathaway Children's Services**, *supra*.

not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.